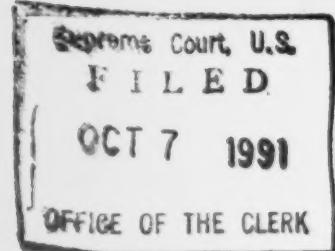


91-576



No. _____

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1991

ELLEN SCHNEIDER, EUGENE SCHNEIDER, DAVID
SLEIGHT, JIM ANDERSON, KAREN ANDERSON,
AGNES ASIALA, JOSEPH ASIALA, ARNOLD
ASIALA, LENNEA BRESETTE, LOIS BRESETTE,

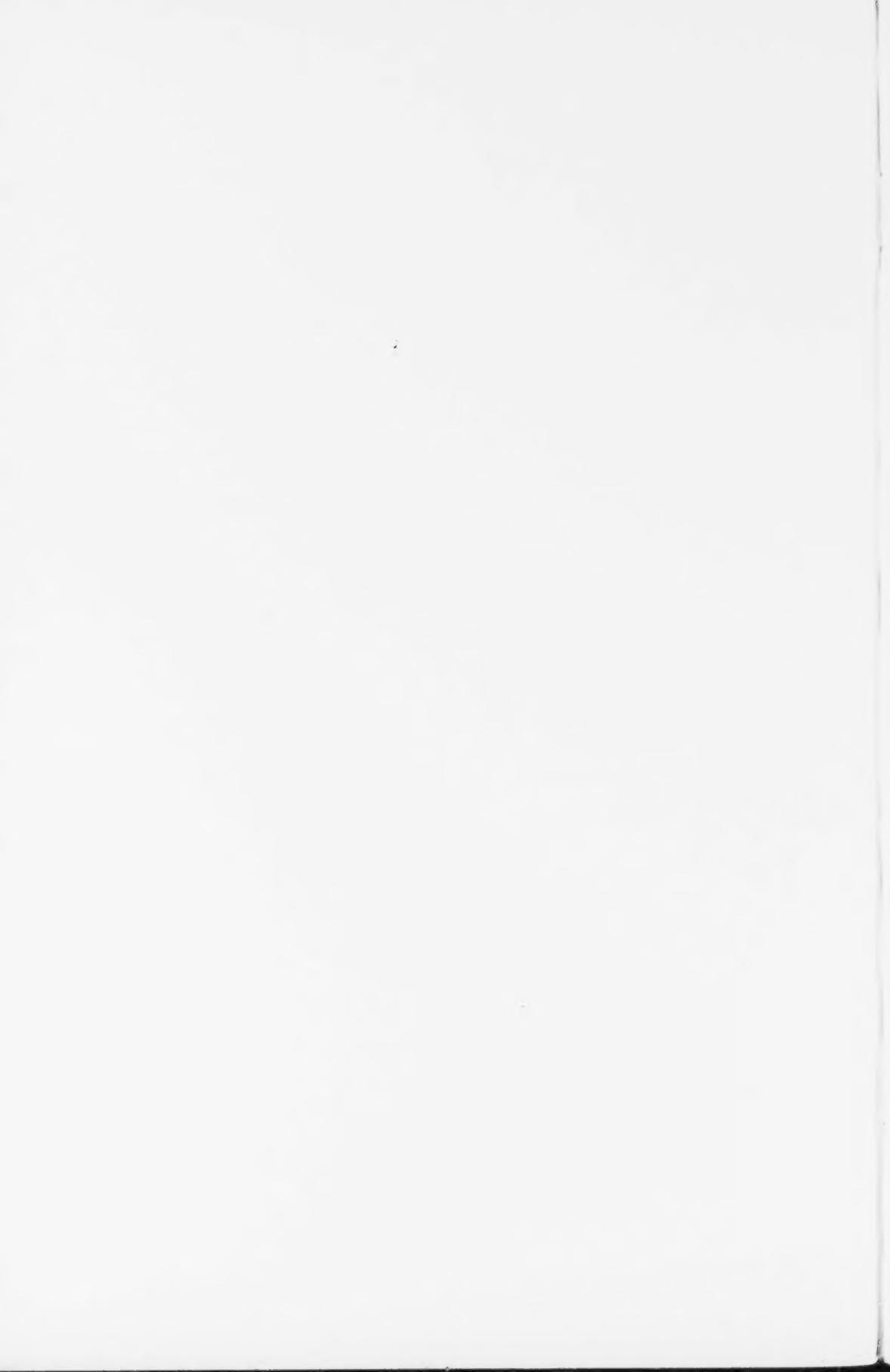
[Caption Continued]

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
AND
APPENDIX TO PETITION

Richard L. Cates,
Attorney of Record
LAWTON & CATES, S.C.
214 West Mifflin Street
Madison, WI 53703

Attorneys for Plaintiffs-Appellants-
Petitioners



PAUL BRESETTE, LYNN DOUGAL, JULIE HARTMAN, MICHAEL L. CHAPMAN, LINDA L. CHAPMAN, ANGELA B. CHAPMAN, MACY WILLIAM CHAPMAN, GALE CURTIS, CANDACE CURTIS, ROGER CURTIS, LORI CURTIS, TRACY CURTIS, JAMES FOSTER, JR., PAMELA FOSTER, BRYAN FOSTER, JAMES FOSTER, III, JUSTIN FOSTER, RYAN FOSTER, DANIEL GEURTS, HARRIET GEURTS, BRIGITTE GEURTS, ADAM GEURTS, ZACHARY GEURTS, CATHERINE GEURTS, SANDRA HETRICK, ROBERT HETRICK, JEREMY HETRICK, NICHOLAS HETRICK, CHRISTOPHER HETRICK, RANDY KRUEGER, BRENDA KRUEGER, HEATHER ORDWAY, KATHERINE J. KUNICK, ERNEST M. KUNICK, JASON K. KUNICK, LINDA LANASA, MICHAEL LANASA, JR., HOLLY LANASA, MATTHEW LANASA, KATHLEEN J. MISUN, JOHN MISUN, LLOYD E. NEVEAU, KAREN NEVEAU, LLOYD R. NEVEAU, JACKIE A. NEVEAU, ETHEL RAY, JOSEPH RAY, PATRICK THOMPSON, JENNIFER THOMPSON, JUSTIN THOMPSON, SHAWNA THOMPSON, JAMES VILONA, VICKY VILONA, TRACY VILONA, KRISTY VILONA, EDWARD WHITE, JUDY WHITE, GREGORY WHITE, RODNEY WHITE, PAUL WHITE, JAMES WHITE, GARY K. BENOIT, DEBRA D. BENOIT, TIFFANY D. BENOIT, SCOTT G. BENOIT, DENNIS L. ENGBERG, BARBARA K. ENGBERG, REBECCA E. ENGBERG, GARY FREDRICKSON, CAROLYN FREDRICKSON, NICOLE FREDRICKSON, DEREK FREDRICKSON, ROBERT FREY, NONA FREY, DAGAN FREY, JUSTIN FREY, PATRICK GRADY, LINDA GRADY, CATRINA GRADY, CHRISTINA GRADY, GERALD GRELL, TAMARA GRELL, MICHAEL HENDERSON, KAREN HENDERSON, KIMBERLY HENDERSON,

MORGAN HENDERSON, MATTHEW HENDERSON,
NICHOLAS HENDERSON, GERALDINE KANGAS,
JAMES KANGAS, PETER JAY KANGAS, TERI
KIMINSKI, CHAD KIMINSKI, AMANDA KIMINSKI,
KATHY KRAM, KENNY KRAM, BRIAN KRAM,
CHRISTOPHER KRAM, BERNADETTE MARKO,
ROBERT MARKO, JEFREY MCCANN, CATHERINE
MCCANN, LORI O'NEIL, SHANE O'NEIL, SHAD
O'NEIL, SHEYANNE O'NEIL, SHALEAK O'NEIL,
SHAY SAMUELSON O'NEIL, CONNIE L. SATRE,
MARK W. SATRE, MARA K. SATRE, SONJA
SAVAGE, WILLIAM SAVAGE, JACOB SAVAGE,
JESSE SAVAGE, RICHARD WALIOR, JAMES
BENESCH, MARY BENESCH, MELISSA BENESCH,
CORRINA BENESCH, LAURI BENESCH, DAVID W.
BRUNCLIK, LORETTA P. BRUNCLIK, SCOTT W.
BRUNCLIK, CHRISTOPHER BRUNCLIK, MICHAEL
D. BURRELL, LINDA L. BURRELL, RITA A.
BURRELL, AMY L. BURRELL, DAVID P. BURRELL,
VERNON A. BUSHEY, CONNIE L. BUSHEY,
RHONDA M. BUSHEY, MICHELE L. BUSHEY, CARL
B. CADOTTE, KYLE L. CADOTTE, ROGER
CARBON, TERRY CARBON, BART CARBON, CORY
CARBON, HENRY G. COOK, DANIEL DESMIDT,
KIM DESMIDT, BRENDA DESMIDT, CHAD
DESMIDT, STANLEY DERAITUS, BARBARA
DERAITUS, MICHELLE DERAITUS, DANIEL
DERAITUS, SCOTT DERAITUS, MARK DERAITUS,
MICHAEL D. DWYER, BETTY A. DWYER,
LAWRENCE FAUST, KIM FAUST, SAMANTHA
FAUST, AARON FAUST, ANTHONY FURYK,
SANDRA FURYK, BRUCE FURYK, LYNN FURYK,
AMY FURYK, MARK GANSKE, MICHELE GANSKE,
AMANDA GANSKE, BERTHA M. HANNU, WILLIAM
V. HANNU, DIANE C. HIETALA, WILLIAM S.
HIETALA, WAYNE W. HIETALA, SANDRA B.

HOEFFLING, DARRELL F. HOEFFLING, JAMES W.
HOEFFLING, MICHELLE L. HOEFFLING, AARON C.
HOEFFLING, LINDA M. JONES, BRUCE A. JONES,
KURT A. JONES, SCOTT M. JONES, CHAD J. JONES,
ELIZABETH M. KELLETT, THOMAS W. KELLETT,
JACQULYN LAMBERTY, ROBERT LAMBERTY,
LISA LAMBERTY, LINDY LAMBERTY, ROBERTA
LAMBERTY, BARRY LARSEN, CAROLYN LARSEN,
DAWN LARSEN, BRYANT LARSEN,, GARRETT
LARSEN, DESSI LARSEN, PATTY J. LARSON, OWEN
J. LARSON, BETH A. LARSON, JAMES LARSON,
NANCY E. LAUREN, DENNIS F. LAUREN, SHAWNA
L. LAUREN, SCOTT D. LAUREN, WENDY N.
LAUREN, BRIAN LONG, SHEILA LONG, JASON
LONG, CLAYTON LONG, MARY ANN
LUDWIKOWSKI, FRANK J. LUDWIKOWSKI, ROSE
MALEK, GRETCHEN VISSERS, ELAINE VISSERS,
STEPHANIE VISSERS, ARLENE KAY MILLER,
DONALD V. MILLER, JEFFREY B. O'DONNELL,
CHERYL A. O'DONNELL, SHANNON L.
O'DONNELL, DANA R. O'DONNELL, NATHAN J.
O'DONNELL, ROBERT A. PARES, KATHLEEN E.
PARES, KRISTY M. PARES, KERRY A. PARES,
DOUGLAS PETERSON, MARGARET PETERSON,
BRUCE PETERSON, SCOTT PETERSON, RUSSEL
PETERSON, DANIEL PETERSON, TERRY
PETERSON, MONICA RICE, THOMAS RICE, JASON
RICE, IVY RICE, AMY RICE, LOIS K. RILEY,
DONALD R. RILEY, TIMOTHY M. SALTER, JOHN
SCHNEIDER, ALVINA H. SLEIGHT, MARTIN DAVID
SLEIGHT, TERESA L. SMITH, LOUIS W. SMITH,
MICHELLE SMITH, STEPHANIE SMITH, DEBORAH
A. SWARTZ, MICHAEL S. SWARTZ, MARCUS S.
SWARTZ, MICHAEL D. SWARTZ, GENE VISGER,
LOLA VISGER, MICHELLE VISGER, ERIC VISGER,
DENNIS WARTGOW, CATHLEEN WARTGOW,

AMANDA WARTGOW, WILLIAM WARTGOW,
ANDREA WARTGOW, DANE E. ZOOK, CONNIE R.
ZOOK, LLOYD J. ZOOK, JEREMY D. ZOOK,
RUSSEL J. ZOOK, AARON G. ZOOK,

Plaintiffs-Appellants-Petitioners,

v.

UNITED STATES OF AMERICA, CLAYTON K.
YEUTTER, NEAL SOX JOHNSON, and
JACK F. KEMP,

Defendants-Appellees-Respondents.

ISSUE PRESENTED

ARE PLAINTIFFS' CLAIMS AGAINST THE UNITED STATES BARRED BY THE MISREPRESENTATION EXCEPTION TO THE FEDERAL TORT CLAIMS ACT WHERE THE UNITED STATES NEGLIGENTLY SUPERVISED CONSTRUCTION OF THE HOMES BY REQUIRING THE HOMES TO BE DEFECTIVELY CONSTRUCTED IN ACCORDANCE WITH NEGLIGENTLY REVIEWED PLANS AND SPECIFICATIONS?

ANSWERED BY THE DISTRICT COURT AND COURT OF APPEALS: YES.

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OPINIONS OF THE COURTS BELOW

The opinions of the courts below are part of the Appendix of Plaintiffs-Appellants-Petitioners.

The judgment of the court of appeals was entered July 10, 1991.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision and judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 2674, Title 28, of the United States Code, provides in relevant part:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

The provision relied upon to bar plaintiffs' claims is 28 U.S.C. § 2680(h), which provides:

The provisions of this chapter and section 1346(b) of this title shall not apply to --

....

(h) Any claim arising out of... misrepresentation, deceit....

STATEMENT OF THE CASE

A. Nature of the Case and Jurisdiction.

This action is brought by plaintiffs for personal injuries and property damages arising from defectively constructed manufactured homes of Tri State Homes, Inc. (R. 2, paras. 30, 35 and 41.) This action was brought pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671, et seq., in the district court pursuant to 28 U.S.C. § 1336(b). Plaintiffs claim that the Government's supervision of the construction of their homes, combined with the negligent review of plans and specifications, was undertaken for the benefit of the plaintiffs pursuant to the requirements of federal financial assistance programs. The Government's negligent discharge of these inspection and supervisory responsibilities has caused physical injuries and property damage to plaintiffs.

B. Background of Tri State.

The plaintiffs are occupants of factory built homes manufactured by Tri State Homes, Inc. (hereafter TSH or Tri State). (A-102.) TSH manufactured the homes in Mercer, Wisconsin from 1970 until the early 1980's. TSH marketed modest-sized, low-income homes in northern Wisconsin, northern Minnesota and the upper peninsula of Michigan. (Record # 28--Mears Deposition pp. 21, 27, 28 attached as Exhibit A to Olson Affidavit¹.) Most of the plaintiffs received financial assistance from the FmHA under the Rural Housing Program of the Federal Housing

¹ The citations to the docket hereinafter will appear as set forth in the following example: R. 28--Mears. Dep. pp. 21, 27- 28, attached as Ex. A to Olson Aff. Citations to the appendix will appear as A-page number.

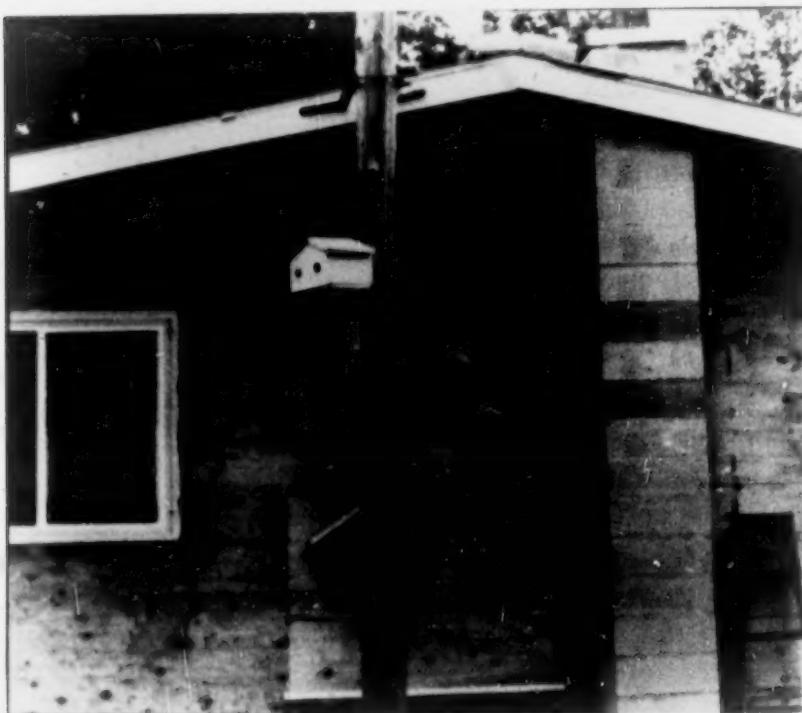
Act of 1949. 42 U.S.C. § 1472. The remainder received mortgage insurance from HUD. (A-102.)

C. Damage Suffered by Plaintiffs

The plaintiffs were damaged by the rotting of the plywood sheathing of the exterior walls of their homes. (A-103, 104, n.2.) The sheathing rotted because the wrong type of sheathing paper was applied over it. According to the HUD Minimum Property Standards 712-2-2.3, "Vapor permeance of sheathing paper or roof underlayment shall be at least 5 perms." (R. 27, Ex. 2.) A perm is a unit that measures the water vapor permeance of a material. *Id.* The higher the perm the greater the amount of vapor that can pass through it. Figure 1 shows a Tri State Home after a few pieces of siding have been removed. (R. 2,



para. 20.) The brown sheathing paper is called Thilco 30/30.² It was used on the plaintiffs' homes. The perm value of Thilco 30/30 was less than 1 (R. 25--paragraphs 1-9; A-103.) As a result moisture was trapped in the wall cavity and caused the sheathing to rot. (A-103.) Figure 2 depicts rotted sheathing on one of the plaintiffs' homes. (R. 2, para. 23.)



Plaintiffs' claims are for physical injuries as well as for physical damage to property. (A-103, 104.) Dr. John J. Ouellette, a board certified allergist and immunologist examined 220 plaintiffs and concluded that a significant

² "Thilco" is a trade name used by the Thilmany Pulp and Paper Company, Kaukauna, Wisconsin, for certain of its paper products. Thilco was the sole paper used by Tri State to cover the plywood sheathing until mid-1978. (R. 29--Mears Dep. pp. 43-47, 92-93, 137-38, attached as Ex. B to Olson Aff.)

number of occupants of Tri State homes suffer from a similar pattern of illnesses that he referred to as the Tri State syndrome. The features of these illnesses include upper and lower airway disease related to infections and allergies secondary to exposure to mites, molds and other antigens, chronic mixed headaches secondary to sinus congestion and muscle tension, and annoyance irritation syndrome. (R. 26, p. 2.) Thus, the defective construction of plaintiffs' homes has caused them to suffer physical injuries in addition to the deterioration of the homes. (R. 2, paragraphs 30, 35 and 41.)

D. The Role of the United States Government

The Rural Housing Program began in 1949. The Secretary of Agriculture is authorized by Title V of the Housing Act of 1949, 42 U.S.C. sec. 1471 et seq., to extend financial and technical assistance through the Farmers Home Administration ("FmHA") to low-income rural residents who seek to obtain housing. The purpose of this act is to provide "decent, safe, and sanitary" housing. 42 U.S.C. § 1471(a).

There are several features of the act that are important to this case. Three of the most important are:

1. the borrower must be "low income," which means that the borrower must be unable to obtain a loan using conventional financing;
2. the housing must be "decent, safe and sanitary," which means it must at least meet the HUD Minimum Property Standards ("MPS"); and

3. Government officials are present at every stage of the process to insure that the housing conforms to the purposes of the Act.

42 U.S.C. §§ 1471(a), 1476(a), 7 C.F.R. 1802 et seq. These requirements ensure that a borrower's only opportunity to purchase a home is through the rural housing program and a borrower cannot purchase a home unless that home conforms to HUD Minimum Property Standards (MPS).

The HUD Minimum Property Standards are of critical importance to the Rural Housing Program because they are the "minimum acceptable qualities for site improvements, planning, products, and methods of construction considered by HUD to be acceptable ..." for HUD housing programs. (R. 23-HUD Handbook 4950.1, pp. 1-3, attached as Ex. D to Schooler Aff.) In introducing the MPS as an official regulation in 1973, HUD pointed out:

The Minimum Property Standards are a single unified set of technical and environmental standards relating to those characteristics in a property which will provide present and continuing utility, durability, desirability, economy of maintenance, and a safe and healthful environment.

(R. 23--39 Fed. Reg. 26895, attached as Ex. G to Schooler Aff.; emphasis added.) The MPS were developed and utilized to make certain that the structural construction of homes met the national housing objective of a "decent home and a suitable living environment for every American family." (R. 23-Environmental Impact

Statement of MPS, p. 11, attached as Ex. G to Schooler Aff.) Thus, pursuant to the intent of MPS and the applicable regulations, the inspection and review process is performed by the Government for the benefit of the home buyer. (R. 23--Bell Dep. pp. 62-63, attached as Exhibit C to Schooler Aff.; R. 23--Environmental Impact Statement of MPS, p. 11, attached as Ex. G to Schooler Aff.; 7 C.F.R. § 1802, et seq.)

In this case, the plans and specifications of all the houses proposed to be built by Tri State had been compared by Government employees with the Minimum Property Standards and had been determined to have met those standards. (R. 23--Rezell Dep., pp. 21, 36, 72-75, 90-92, Fairman Dep., pp. 35, 46-48 61-64, 80-81, 104, and Ex. 18 attached as Exs. A and B to Schooler Aff.) This determination was erroneous. In all cases, the sheathing paper approved for construction did not meet the minimum standards. (A-103.) Notwithstanding, the homes were approved for construction. During the construction phase, Government employees made inspections at the plant and at the site. (R. 23, Ex. E at pp. 39-42, Ex. 2, 6; R. 23.) These inspections were made to insure the home construction conformed with the erroneous plans as approved. (*Id.*) The result of the failure of the plans and specifications to comply was the homes trapped water, became saturated, rotted and caused physical injury to the occupants.

The plans and specifications submitted by TSH to HUD indicated that "Thilco 30/30" would be used as sheathing paper. (A-103.) HUD never questioned its use when it issued the RLA. (R. 28--Mears Dep., pp. 30-38, attached as Ex. C to Olson Aff.; R. 23--Rezell Ex. 1 and 12, Fairman Dep., pp. 35, 46-48, attached as Exs. A and B to Schooler Aff.) As a result Thilco 30/30 was a required component in all Tri State homes financed by the FmHA.

(A-102, n. 1; R. 23--Bochler Dep., pp. 39-42 and Exs. 2, 6 attached as Ex. E to Schooler Aff.) This defect caused the plaintiffs' homes to rot and plaintiffs to suffer physical injuries. (A-103-04, n. 2.)

REASONS FOR ALLOWANCE OF THE WRIT

**THE DECISIONS OF THE COURTS BELOW
CONFLICT WITH THE DECISION OF THE UNITED
STATES SUPREME COURT IN *BLOCK V. NEAL*, 460
U.S. 289 (1983), AND CONFLICT WITH THE TORT
LAW ESTABLISHED BY THE WISCONSIN SUPREME
COURT.**

**A. Plaintiffs' Claims Are For Negligent Supervision
Causing The Construction Of Defective Homes.**

Plaintiffs' case is simple.

Plaintiffs allege that the Government's employees, acting within the scope of their employment, assumed the duty to supervise the construction of the homes which were to be built for plaintiffs. The essential purpose for this supervision was to insure the homes would be decent, safe and sanitary. This was the end the law and the regulations under which they worked sought to accomplish. The law and regulations authorized this supervision to aid and assist plaintiffs who were likely to need this help.

In furtherance of this end, the Government's employees promulgated a detailed set of standards which they identified as Minimum Property Standards. They used these standards in the course of their work to determine whether a proposed home would be decent, safe and sanitary. To effectuate this review, the Government's employees required the builder of a proposed home to submit very detailed specifications of the home to be built. The Government's employees were then responsible to compare these specifications with the requirements of the Minimum Property Standards.

In all the cases consolidated in this action, the same builder did submit those detailed specifications on the forms supplied by the Government's employees.

In all of the cases, the Government's employees failed to exercise ordinary care in comparing the permeability of the builder's proposed sheathing paper to that required by their Minimum Property Standards. The material requirement in the Minimum Property Standards was that the paper be at least a five. This requirement regarding permeability is vital to a decent, safe and sanitary home. If the permeability is too low, water is trapped in the home, the home rots, and the people living there are likely to become ill and suffer physical injuries. This is due to the molds and dust mites caused by the moisture.

As a result of the negligence in examining and comparing the builder's specifications against the Minimum Property Standards, the Government's employees determined that the homes proposed were decent, safe and sanitary, so allowing construction to proceed.

During the construction of these homes, the Government's employees continued their supervision. From time to time, they would make plant and site inspections of the homes being built. The original negligence of the Government's employees at the time of the examinations of the specifications was extended and continued by and throughout these later plant and site inspections. These employees were not expected to make independent judgments during construction stages regarding whether the plans and specifications complied with the Minimum Property Standards. Their sole responsibility was to insure that the plans be implemented as approved.

The homes were built, water was trapped, the homes rotted, and their owners and families inside suffered from physical injuries.

This is not an action for misrepresentation. This action is one which is based on the negligent conduct of the Government's employees in causing homes that were not decent, safe or sanitary to be built. These employees took charge. They determined what they would permit to be built and, thereafter, through their conduct, insured it be built exactly as they approved.

Under Wisconsin law, this is an actionable tort. Under *Block*, it is an actionable tort pursuant to the Federal Tort Claims Act.

B. The Law Of Wisconsin Governs Whether The Conduct Is A Tort.

Section 1346(b), 28 U.S.C., provides:

Subject to the provisions of chapter 171 of this title [28 USCS § 2671, et seq.], the district courts...shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages,...for injury or loss of property, or personal injury or death caused by the wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, *under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.*

The negligent act was the failure of the HUD field office to use reasonable care in inspecting the plans and specifications submitted by Tri State. The HUD field office charged with the responsibility of reviewing the plans and specifications was located in Milwaukee, Wisconsin. Since the negligent act occurred at the HUD field office in Wisconsin, the law of Wisconsin applies.

C. Pursuant To Wisconsin Law, The Conduct Of The Government's Employees Constituted A Cause Of Action For Negligence Permitted To Be Brought Under The Federal Tort Claims Act.

- I. The Government's employees, acting within the scope of their authority and in the course of their employment, voluntarily undertook to supervise the construction of plaintiffs' houses.**

Both the laws and regulations defining the scope and authority of the Government's employees acting under these circumstances authorize these employees to assist the homeowners in obtaining "decent, safe and sanitary" housing. The Government's employees are authorized to extend financial and technical assistance. 42 U.S.C. § 1471(a). Section 506 of the Act provides:

Buildings and repairs constructed with funds advanced pursuant to this subchapter shall be supervised and inspected as required by the Secretary. *In addition to the financial authorization...the Secretary is authorized to furnish...technical services such as building plans, specifications, construction supervision and inspection....*

42 USC § 1476(a) (Emphasis added).

This authority for the Government's employees to provide assistance was in keeping with what might well be necessary to assure construction of decent, safe and sanitary construction. Those persons applying generally would have little, if any, experience in the construction of a decent, safe, sanitary home.

In undertaking their supervision responsibility, the Government's employees established a handbook requiring the Minimum Property Standards to be satisfied in the construction of homes for those homes to achieve the statutory purpose of decent, safe and sanitary housing. This book, entitled HUD Handbook 4950.1 (R. 23, Ex. D) contained detailed specifications necessary to be met in order for the Government's employees to permit the home to be built.

In order to implement this part of the Government's supervision process, its employees created Form FHA 424-2 "Dwelling Specifications." (R. 53--Proposed Finding of Fact, Ex. 3.) This form made exhaustive inquiry of the builder regarding the specifications for the home the builder was planning to construct.

The Government's employees in the course of their supervision compared these specifications reported by the builder with the Minimum Property Standards and then either approved or disapproved the home for construction.

If they approved the home, the Government's employees then continued to supervise the construction by inspecting the progress of the construction both at the plant and at the home site. (R. 23, Ex. E at pp. 39-42, Ex. 2, 6; R. 23.) When they were satisfied that the home was built as approved, they authorized payment. (Id.)

In the course of the supervision by the Government's employees, they completely controlled and dominated the construction of the homes. They examined the specifications to approve or disapprove. If they approved, they inspected the construction to assure it was built as approved. After construction was completed, they paid only if it was built as they approved.

2. **The Government failed to exercise ordinary care in supervising construction of plaintiffs' homes, thereby causing moisture to be trapped in the walls, the walls to rot, and the resultant ill health and physical injuries.**

One very material specification required by the HUD Minimum Property Standards related to sheathing paper. According to the standards, it was mandated that "vapor permeance of sheathing paper or roof underlay shall be at least 5 perms." Section 712-2-2.3 (R. 27, Ex. 2, emphasis added.) A perm is a unit measuring vapor permeance. The higher the perm, the greater the amount of vapor which can pass through it. The sheathing paper identified within the builder's specifications, Thileco 30/30, had a permeance of less than one perm. (R. 25 at paras. 1-9.) Notwithstanding this difference and the importance of the difference as it related to whether the home would be decent, safe and sanitary, the Government's employees approved these homes for construction.

The home approved for construction was not one which would be a decent, safe or sanitary home. The risk created by the failure to exercise ordinary care was one which would foreseeably cause the home to be wet, rot, and cause the people living therein to suffer ill health.

The Government's employees continued their supervisory roles once construction approval was given. Their job thereafter was to inspect. They were not to make independent judgments regarding the construction as it related to the plans and specifications. They were only required to inspect at the plant and home site to see if the home was being and was finally constructed according to the plans which the Government's employees had earlier approved. The supervision powers mandated that an unsafe house be built. The negligence in the original inspection of specifications carried throughout the process and controlled the process.

3. Wisconsin tort law recognizes tort liability in circumstances where a duty voluntarily assumed, if done in a negligent manner, causes injury to another.

Wisconsin law clearly establishes a duty to use reasonable care in conducting building inspections and in the review of plans and specifications. *Wood v. Milin*, 134 Wis. 2d 279, 287-90, 397 N.W.2d 479 (1986) (municipal building inspector); *Coffey v. City of Milwaukee*, 74 Wis. 2d 526, 531, 247 N.W.2d 132 (1976) (municipal building inspector); *A.E. Investment Corp. v. Link Builders, Inc.*, 62 Wis. 2d 479, 487-88, 214 N.W.2d 764 (1974) (architect). These cases neither rely upon nor discuss misrepresentation as a basis for the liability.

In deciding that the plaintiffs' claims here are for misrepresentation, the decisions of the courts below are contrary to established tort law repeatedly declared by the Wisconsin Supreme Court. The Wisconsin Supreme Court has never relied upon misrepresentation as a basis for liability in cases of negligent inspection and supervision of plans, specifications and construction of buildings. Accordingly, the decisions of the lower courts that the

virtually identical claims are misrepresentation claims are contrary to several recent decisions of the Wisconsin Supreme Court.

4. The Supreme Court in *Block v. Neal* recognized that a tort action based upon harm caused by government employees failing to exercise due care after they had voluntarily undertaken to supervise construction was actionable under the Federal Tort Claims Act.

This Court, in the *Block* case, determined similar actions by Government employees to be actionable. In that case, the Government's employees had approved certain plans and specifications for building. In the course of the construction, the builder deviated from the plans approved. The government inspected and did not discern those differences. They approved the house as built. They issued a form that stated that the house was built in compliance with the plans and specifications. This form permitted the owner to have the mortgage funds released to the builder and thus allow the title to transfer to the purchaser. The homeowner subsequently realized the builder had not complied with the plans which the Government's employees approved. Block identified her cause as a suit for negligent supervision.

In *Block*, the negligent supervision was later in the construction process. In both cases, the negligence was in the supervision process and in both cases, because of the Government's employees' negligence, the parties ended up in a home which did not meet what the statute envisioned, a decent, safe and sanitary home. In both cases, the negligence resulted in the government issuing a document that allowed the home to be purchased.

Here, the negligence occurred earlier, but once it had occurred, the negligence dictated that a defective home be built. There is no meaningful difference between *Block* and the present case. The courts below erred, not only in misapplying *Block*, but in misunderstanding the tort of negligent supervision.

Review by this Court is necessary, not only to prevent *Block* from becoming meaningless, but to clarify the distinction between a claim for negligent supervision and misrepresentation. This is necessary to prevent the misrepresentation exception from swallowing up the entire tort of negligence.

CONCLUSION

The decision of the court of appeals is contrary to the decision of this Court in *Block*. The decision is also contrary to several recent decisions of the Wisconsin Supreme Court. The decision evidences substantial confusion as to what constitutes a misrepresentation versus what constitutes the tort of negligent supervision. Therefore, plaintiffs-appellants-petitioners respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,

LAWTON & CATES, S.C.,
By: Richard L. Cates,
Attorney of Record
214 West Mifflin Street
Madison, WI 53703
Attorneys for Plaintiffs-
Appellants-Petitioners

APPENDIX TO PETITION

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In the
United States Court of Appeals
For the Seventh Circuit

No. 90-1938

ELLEN SCHNEIDER, EUGENE SCHNEIDER,
DAVID SLEIGHT, et al.,

Plaintiffs-Appellants,

v.

USA, CLAYTON K. YEUTTER,
NEAL SOX JOHNSON, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.

No. 89 C 576—Barbara B. Crabb, *Chief District Judge.*

ARGUED SEPTEMBER 27, 1990—DECIDED JULY 10, 1991

Before CUMMINGS, COFFEY, and MANION, *Circuit Judges.*

COFFEY, *Circuit Judge.* The plaintiffs brought this action pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* for personal injuries and property damages arising from construction defects in manufactured homes. The district court granted the government's motion for summary judgment on the ground that the plaintiffs' claims were barred by the misrepresentation exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(h). We affirm.

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I. FACTS AND DISPOSITION BELOW

The plaintiffs are owners of factory-built houses manufactured by Tri State Homes, Inc. ("Tri State"), manufactured in Mercer, Wisconsin from 1970 to 1978 and marketed in Northern Wisconsin, Northern Minnesota and the upper peninsula of Michigan. In January 1971, the Department of Housing and Urban Development ("HUD") issued a Regional Letter of Acceptance to Tri State after HUD had reviewed the plans and specifications for the models at issue. This letter of acceptance stated that the proposed construction of the Tri State models and the materials listed in Tri State's plans and specifications met HUD's Minimum Property Standards. The plaintiffs purchased the houses from Tri State with federal financial assistance from the Farmers Home Administration ("FmHA") or HUD. Without this Letter of Acceptance or an equivalent review of Tri State's specifications by the FmHA, buyers could not receive federal financing to purchase the houses from Tri State.¹

The day to day construction of the houses by Tri State in its factory in Mercer, Wisconsin was neither supervised by either FmHA nor HUD. The government's only involvement in the construction of the houses was a HUD two or three hour semi-annual inspection at the Tri State factory. The purpose of these visits was to determine if the materials used in the construction of houses conformed with the materials listed in the specifications. Thus, the inspectors did not test the materials for compliance with HUD's Minimum Property Standards, but rather, during their semi-annual visits to the Tri State

¹ Compliance with HUD's Minimum Property Standards was required before HUD would issue a Letter of Acceptance. If the plans and specifications did not satisfy the Minimum Property Standards, Tri State would have had to amend the plans in order to insure their compliance. Moreover, once the houses were built, Tri State had to certify to HUD that each house was built in compliance with the Letter of Acceptance and with the Minimum Property Standards.

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factory, attempted to insure that the materials being used were the same as those approved in the Letter of Acceptance (the inspectors relied on the earlier determination by the HUD Regional Office that the materials listed in the Letter of Acceptance satisfied HUD's Minimum Property Standards).

Many applicants received financing from FmHA for the purchase of the houses and submitted copies of their prospective dwelling specifications with their applications to the appropriate FmHA county office. The FmHA supervisor did not independently review the specifications to determine whether they met the minimum property standards but instead relied on the HUD regional letter of acceptance and Tri State's certification that the house was built with the materials that met the Minimum Property Standards.

Tri State's construction design called for the use of sheathing paper, which is placed between the wood board sheathing of the outer walls and the siding to reduce air infiltration. The plans and specifications submitted by Tri State to HUD stated that Thilco 30/30 building paper would be used as sheathing paper on the factory-built houses. HUD's Minimum Property Standards in effect during 1970 to 1978 required that the sheathing paper used have a permeability ("perm") rating of at least 5 perms. However, the sheathing paper used on the plaintiffs' houses had a perm rating of less than 1 perm. Thus, the sheathing paper was inadequate and trapped moisture in the wall cavity and frequently caused the sheathing to rot.

The plaintiffs brought claims against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, alleging personal injuries and property damages arising from the defective factory-built houses.² The plain-

² In their opening brief, the plaintiffs allege the following personal injuries:

"A. Upper airway disease characterized by symptoms to the nose, sinuses, ears, throat, and mouth breathing diagnosed

(Footnote continued on following page)

tiffs claim that the government's inspection of the plans and specifications was undertaken for the benefit of the plaintiffs pursuant to the requirements of the Federal Financial Assistance Programs. As a consequence of the use of impermeable sheathing paper, the plaintiffs claim that the government was negligent in its inspection and supervisory responsibilities, thus causing their personal injuries and property damage. On March 23, 1990, the district court granted the government's motion for summary judgment ruling that the plaintiffs' claims were barred by the misrepresentation exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(h). The plaintiffs appeal.

II. ISSUE FOR REVIEW

The issue before us is whether the district court properly concluded that the plaintiffs fail to raise a claim independent of the tort of misrepresentation. The plaintiffs in essence argue that their claim is not barred because they were not harmed by relying on the government's misstatements, but rather by the government's failure to detect the proposed use of inadequate sheathing material in Tri State's submitted plans. The government contends that the plaintiffs' claims fall within the misrepresentation exception because they arise out of the government's communication of faulty information through its approval

² *continued*

as mixed rhinosinusitis related to infections and allergies secondary to exposure to mites, molds and other antigens;

- "B. Lower airway disease characterized by hyper-reactive airways diagnosed as asthmatic bronchitis related to infections and allergies secondary to exposure to mites, molds and other antigens;
- "C. Chronic mixed headaches secondary to sinus congestion and muscle tension; and
- "D. Annoyance Irrigation syndrome."

The property damage alleged by the plaintiffs included "the rotting of the plywood sheathing of the exterior walls of their homes."

of the materials used in Tri State's houses in its Letter of Acceptance.

Our review of the district court's grant of summary judgment in favor of the government is *de novo*: "[W]e must decide whether the record shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Dribeck Importers v. G. Heileman Brewing Co.*, 883 F.2d 569, 573 (7th Cir. 1989) (citations omitted). "A genuine issue of material fact exists only where 'there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.'" *Id.* at 573 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

III. ANALYSIS

The Federal Tort Claims Act ("FTCA") is a limited waiver of sovereign immunity that permits an injured claimant to recover damages from the United States "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). The FTCA exempts the government from liability for specific torts, one of which is misrepresentation: "The provisions of this chapter and section 1346(b) of this title shall not apply to—. . . (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, *misrepresentation*, deceit, or interference with contract rights." 28 U.S.C. § 2680 (emphasis added). These exceptions define this court's jurisdiction to entertain a suit against the United States: "It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain

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the suit.'" *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)).

The plaintiffs argue that their claim is not barred by the misrepresentation exception because they were not harmed by relying on the government's misstatements, but rather by the government's failure to detect the use of impermeable sheathing material in Tri State's submitted plans. The defendants allege that Tri State would not have been able to market the houses had the government advised Tri State that the sheathing used in the construction of the houses did not comply with HUD's Minimum Property Standards. Thus, the plaintiffs' argument is based on the alleged negligence underlying HUD's determination that the plans and specifications of the houses complied with the Minimum Property Standards. Whether the plaintiffs' characterization of their claim falls outside of the misrepresentation exception is dependent upon our analysis of the two leading Supreme Court cases on the issue, *United States v. Neustadt*, 366 U.S. 696 (1961), and *Block v. Neal*, 460 U.S. 289 (1983).

Neustadt involved plaintiffs who purchased a house after an inspection by the Federal Housing Administration ("FHA") for the purposes of determining eligibility for FHA mortgage insurance pursuant to § 203 of the National Housing Act of 1934, 12 U.S.C. § 1709. (The FHA later became part of HUD in the early 1970's). The mortgage insurance program was essentially the same as the HUD mortgage insurance program involved in the case before us. After an FHA inspection and appraisal of the house found no defects, the plaintiffs took possession. A short time later, the foundation of the house began to shift, causing damage to the foundation, walls, and ceilings. The plaintiffs brought suit against the government, claiming that they were induced to purchase the house in reliance upon FHA's representation that the house had a certain market value, and that a non-negligent inspection would have disclosed the poor drainage conditions that led to the structural damage. The Fourth Circuit up-

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held judgment for the plaintiffs. The court found that the plaintiffs "could recover on the sole basis of the underlying negligence" and "that the misrepresentation was 'merely incidental' to the 'gravamen' of the claim, i.e., 'the careless making of an excessive appraisal so that [the plaintiffs were] deceived and suffered substantial loss.'" *Neustadt*, 366 U.S. at 704 (citations omitted).

The Supreme Court reversed, holding that the plaintiffs' claim was barred by the misrepresentation exception of the FTCA:

"To say, as the Fourth Circuit did, that a claim arises out of 'negligence' rather than 'misrepresentation,' when the loss suffered by the injured party is caused by the breach of a 'specific duty' owed by the government to him, i.e., the duty to use due care in obtaining and communicating information upon which that party may reasonably be expected to rely in the conduct of his economic affairs, is only to state the traditional and commonly understood legal definition of the tort of 'negligent misrepresentation,'"

Neustadt, 366 U.S. at 706-07. The court further stated:

"The compulsory disclosure provision of § 226 is but one of numerous instances in which Congress has relegated to a governmental agency the duty either to disclose directly, or to require private persons to disclose, information for the assistance and guidance of other persons in the conduct of their economic and commercial affairs. In practically all such instances, it may be said that the Government owes a 'specific duty' to obtain and communicate information carefully, lest the intended recipient be misled to his financial harm. While we do not condone carelessness by the government employees in gathering and promulgating such information, neither can we justifiably ignore the plain words Congress has used in limiting the scope of the Government's tort liability.' "

Id. at 710-11.

Like the plaintiffs in *Neustadt*, the plaintiffs in the case before us relied on government-supplied misinformation in one of its own documents when making their decision to purchase a house: plaintiffs relied on HUD's Letter of Acceptance that the Tri State houses were constructed in accordance with government standards. The plaintiffs have alleged no injury they would have suffered *but for* the communication of HUD's evaluation to Tri State and FmHA. Thus, the alleged duty to insure that the materials used in the construction of Tri State houses complied with the Minimum Property Standards is no different from the alleged duty of the FHA to inspect and appraise houses in a non-negligent manner in which *Neustadt* held was barred by the misrepresentation exception.

In *Block v. Neal*, the Supreme Court again recognized that "the essence of an action for misrepresentation, whether negligent or intentional, is a communication of misinformation on which the recipient relies." *Block*, 460 U.S. at 296. The plaintiff in *Block*, like the plaintiffs in the case before us, obtained a loan from the FmHA for the construction of a pre-fabricated house. The agreement between the plaintiff and the FmHA provided that the FmHA would provide financing for the plaintiff, that the work of the builder would conform to the plans of the FmHA, and that the FmHA had the right to inspect and test all materials and workmanship and to reject any that were defective. An FmHA official inspected the plaintiff's house both during the construction and upon its completion. After the third inspection, the official issued a final report noting that the house was in compliance with FmHA-approved drawings and specifications. After moving into the house, the plaintiff discovered numerous defects. The builder subsequently failed to comply with the FmHA's request to cure the defects in accordance with the builder's warranty to the purchaser, and FmHA declined to pay for certain defects. The Sixth Circuit found that the plaintiffs' complaint was not barred by the misrepresentation exception because 28 U.S.C. § 2674 of the FTCA authorizes suits against the government for the negligence

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of a federal agency in performing a voluntary undertaking. *Block*, 460 U.S. at 293.

The Supreme Court upheld the Sixth Circuit, finding that the plaintiff's Good Samaritan claim was not barred by *Neustadt* and the misrepresentation exception:

"Neustadt alleged no injury that he would have suffered independently of his reliance on the erroneous appraisal. Because the alleged conduct that was the basis of his negligence claim was in essence a negligent misrepresentation, Neustadt's action was barred under the 'misrepresentation' exception. . . . In this case, unlike *Neustadt*, the Government's misstatements are not essential to plaintiff's negligence claim. The Court of Appeals found that to prevail under the Good Samaritan doctrine, Neal must show that FmHA officials voluntarily undertook to supervise construction of her house; that the officials failed to use due care in carrying out their supervisory activity; and that she suffered some pecuniary injury proximately caused by FmHA's failure to use due care. FmHA's duty to use due care to insure the builder adhered to previously approved plans and cure all defects before completing construction is distinct from any duty to use due care in communicating information to the respondent. And it certainly does not 'appea[r] beyond doubt' that the only damages alleged in the complaint to be caused by FmHA's conduct were those attributable to Neal's reliance on FmHA's inspection reports."

Block, 460 U.S. at 296-97. (Citations and footnotes omitted). The Court went on to hold that "[a]lthough FmHA in this case may have undertaken both to supervise construction of Neal's house and to provide Neal information regarding the progress of the construction, Neal's action is based solely on the former conduct." *Id.* at 299. The Court ruled that the misrepresentation exception did not apply because there was a separate cause of action for the negligent supervision of the construction of the plaintiff's house that was distinct and separate from any misstatements made to the plaintiff.

The plaintiffs in the case before us, unlike the plaintiff in *Block*, have alleged no claim for negligent supervision of the construction of Tri State's houses. Indeed, at oral argument, counsel for the plaintiff specifically stated the inspection of Tri State's factory approximately two times per year for two to three hours by a HUD official was "irrelevant" to the disposition of this case. Unlike *Block*, ours is a case where the government's misstatements are essential to the plaintiffs' claims: In order for Tri State to have been able to sell houses to the plaintiffs that were eligible for government financing, HUD had to issue a Regional Letter of Acceptance listing those Tri State houses that had been approved. The plaintiffs relied on the misstatement in this Letter of Acceptance that the Tri State houses were constructed in accordance with government standards (specifically, that permeable sheathing paper was used rather than Thilco 30/30 paper), and unlike the plaintiff in *Block*, have not alleged separate facts which would establish a duty independent of the misrepresentation exception. Thus, the plaintiffs' reliance on *Block* is without merit.

Our case is like *Neustadt*, where plaintiffs who relied on misinformation in a government document when making their decision to purchase a home were found to have stated claims that fell within the misrepresentation exception. In our case it is clear that the plaintiffs would not have been harmed *but for* the misinformation that was communicated through the Regional Letter of Acceptance. In their brief, the plaintiffs argue that "[h]ad the government used due care, the officials would have determined that using 'Thilco 30/30' as sheathing paper violated the HUD Minimum Property Standards. Had either HUD or FmHA rejected the use of 'Thilco 30/30,' defective homes would not have been turned over to the plaintiffs." This is another way of saying that had Tri State not relied on HUD's misrepresentations, the plaintiffs would not have been injured by purchasing the defective homes. Thus, the plaintiffs' claims fall squarely within the misrepresentation exception.

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Our review of other cases supports the finding that the plaintiffs' claims fall within the misrepresentation exception. In *Baroni v. United States*, 662 F.2d 287 (5th Cir. 1981), *cert. denied*, 460 U.S. 1036 (1983), purchasers of federally insured housing brought suit after a flood level location fixed by the FHA proved to be incorrect. This miscalculation made by the FHA employees was communicated to the developer who filled the lots to an elevation above the predicted flood line, as required by FHA. The plaintiffs in *Baroni* argued that a general tort was committed when the agency miscalculated the flood level, and like the plaintiffs in the case before us, they contended that a duty was imposed under state law once the agency undertook to establish the flood level. The Fifth Circuit rejected this argument:

"Assuming that the government's undertaking created a duty under state law to determine the flood level non-negligently, the damages complained of by the plaintiffs still result solely from the fact that the government communicated its miscalculation to the developer who relied on it, and that reliance eventually caused the plaintiffs' damage. As noted above, the plaintiffs are prevented from recovering for these damages under a theory of misrepresentation either because of the misrepresentation exception to the Federal Tort Claims Act in § 2680(h) or because of the fact that a party who has been damaged by, but who has not relied directly on the misrepresentation, does not have a cause of action for misrepresentation. To find that the plaintiffs would be barred from recovering their damages under a direct theory of misrepresentation but to allow them to recover under a theory of 'general tort' liability for damages that would stem from an indirect reliance on the same acts by the government would undermine the misrepresentation exception to the Federal Tort Claims Act."

Baroni, 662 F.2d at 289 (emphasis added).

Also instructive is *Preston v. United States*, 596 F.2d 232 (7th Cir. 1979). In *Preston* farmers brought action un-

der the FTCA against the government for damages they suffered as a result of storing grain in a government approved warehouse that went bankrupt. The farmers contended that the agency's approval of the facility "effectively invited and encouraged farmers" to store grain there. *Preston*, 596 F.2d at 234. Like the plaintiffs in the case before us, the farmers also argued that the agency assumed a duty to the plaintiffs to exercise reasonable care in determining whether the facility was a safe place in which to store grain and to warn them when it became unsafe. Also like the plaintiffs in our case, the plaintiffs in *Preston* attempted to avoid characterizing their claim as one based on a government misrepresentation. The court stated:

"It is not unusual for these and other plaintiffs to describe their cause of action in a way calculated to avoid the misrepresentation exception, but the courts have consistently looked behind the plaintiffs' characterization. On analysis, we think it clear that what plaintiffs are complaining about is an implied misrepresentation. They have alleged that the approval and subsequent auditing in the warehouse by government agencies created an aura that the warehouse was safe, and that they relied to their detriment on this apparent approval by the government agencies [T]his amounts to an allegation of misrepresentation by implication."

Preston, 596 F.2d at 237-38 (citations omitted). Similarly, in the present case, the government's communication of its approval of Tri State's plans created the assurance that the plaintiffs relied on to their detriment. No matter how artfully the plaintiffs attempt to characterize their claim, it is clear that it is barred by the misrepresentation exception of § 2680(h), because no injuries would have occurred *but for* the misstatements in the Regional Letter of Acceptance.³

³ Numerous other cases support our decision that the plaintiffs' claims fall within the misrepresentation exception. For instance,

(Footnote continued on following page)

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The plaintiffs also argue that "Wisconsin law recognizes a duty of care by the government to inspect plans and specifications based upon the Good Samaritan Doctrine." However, even if Wisconsin law created a duty of care to inspect plans and specifications based on the Good Samaritan doctrine as the plaintiffs claim, the damages they allege still result from the same source—the government's misrepresentation. The plaintiffs' claims would not have arisen if the government had not issued the Letter of Acceptance regarding the type of sheathing paper that was required. As the Supreme Court noted in *Neustadt*, regardless of whether state law would "allow recovery under analogous circumstances," if the claim falls within one of the exceptions, the court lacks jurisdiction to entertain the suit. *Neustadt*, 366 U.S. at 705-06. "[F]ederal courts lack subject matter jurisdiction to entertain claims against the United States falling within one of the statutory exceptions to the FTCA . . ." *City of Garland v. Zurn Industries, Inc.*, 870 F.2d 320, 326 (5th Cir. 1989). Indeed, the courts in both *Merklin v. United States*, 788 F.2d 172, 174 (3d Cir. 1986) and *Wells v. United States*, 655 F. Supp. 715, 719 (D. D.C. 1987), affirmed on other grounds, 851 F.2d 1471 (1988), cert. denied, 109 S. Ct. 836 (1989), held that the application of the states' respective Good Samaritan doctrines were barred by § 2680(a). Thus, the plaintiffs' potential claims under Wisconsin's Good Samaritan doctrine are clearly barred by the misrepresentation exception.

³ continued

in *City of Garland v. Zurn Industries, Inc.*, 870 F.2d 320 (5th Cir. 1989), the court held that a claim based on an agency's negligence in the analysis, testing, and eventual approval of the design of a facility was barred by the misrepresentation exception because the claim was based on reliance on inaccurate data generated by a federal agency; see also *Anglo-American & Overseas Corp. v. United States*, 242 F.2d 236 (2nd Cir. 1957); *Williamson v. U.S. Department of Agriculture*, 815 F.2d 368 (5th Cir. 1987); *Saxton v. United States*, 456 F.2d 1105 (8th Cir. 1972); and *Janowsky v. United States*, 913 F.2d 393 (7th Cir. 1990).

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IV. CONCLUSION

HUD's Letter of Acceptance which approved Tri State's plans and specifications was the sole cause of the plaintiffs' injuries: The plaintiffs would have suffered no injuries *but for* the communication of inaccurate information regarding the sheathing material. Thus, our case is analogous to *Neustadt* because the plaintiffs do not raise a claim independent of the tort of misrepresentation, and as a result, their claims against the government are barred. Therefore, the decision of the district court is

AFFIRMED.

A true Copy:

Teste:

*Clerk of the United States Court of
Appeals for the Seventh Circuit*

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ELLEN SCHNEIDER, EUGENE SCHNEIDER, DAVID SLEIGHT, JIM ANDERSON, KAREN ANDERSON, AGNES ASIALA, JOSEPH ASIALA, ARNOLD ASIALA, LENNEA BRESETTE, LOIS BRESETTE, PAUL BRESETTE, LYNN DOUGAL, JULIE HARTMAN, MICHAEL L. CHAPMAN, LINDA L. CHAPMAN, ANGELA B. CHAPMAN, MACY WILLIAM CHAPMAN, GALE CURTIS, CANDACE CURTIS, ROGER CURTIS, LORI CURTIS, TRACY CURTIS, JAMES FOSTER, JR., PAMELA FOSTER, BRYAN FOSTER, JAMES FOSTER, III, JUSTIN FOSTER, RYAN FOSTER, DANIEL GEURTS, HARRIET GEURTS, BRIGITTE GEURTS, ADAM GEURTS, ZACHARY GEURTS, CATHERINE GEURTS, SANDRA HETRICK, ROBERT HETRICK, JEREMY HETRICK, NICHOLAS HETRICK, CHRISTOPHER HETRICK, RANDY KRUEGER, BRENDA KRUEGER, HEATHER ORDWAY, KATHERINE J. KUNICK, ERNEST M. KUNICK, JASON K. KUNICK, LINDA LANASA, MICHAEL LANASA, JR., HOLLY LANASA, MATTHEW LANASA, KATHLEEN J. MISUN, JOHN MISUN, LLOYD E. NEVEAU, KAREN NEVEAU, LLOYD R. NEVEAU, JACKIE A. NEVEAU, ETHEL RAY, JOSEPH RAY, PATRICK THOMPSON, JENNIFER THOMPSON, JUSTIN THOMPSON, SHAWNA THOMPSON, JAMES VILONA, VICKY VILONA, TRACY VILONA, KRISTY VILONA, EDWARD WHITE, JUDY WHITE, GREGORY WHITE,

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RODNEY WHITE, PAUL WHITE, JAMES WHITE,
GARY K. BENOIT, DEBRA D. BENOIT, TIFFANY D.
BENOIT, SCOTT G. BENOIT, DENNIS L. ENGBERG,
BARBARA K. ENGBERG, REBECCA E. ENGBERG,
GARY FREDRICKSON, CAROLYN FREDRICKSON,
NICOLE FREDRICKSON, DEREK FREDRICKSON,
ROBERT FREY, NONA FREY, DAGAN FREY,
JUSTIN FREY, PATRICK GRADY, LINDA GRADY,
CATRINA GRADY, CHRISTINA GRADY, GERALD
GRELL, TAMARA GRELL, MICHAEL HENDERSON,
KAREN HENDERSON, KIMBERLY HENDERSON,
MORGAN HENDERSON, MATTHEW HENDERSON,
NICHOLAS HENDERSON, GERALDINE KANGAS,
JAMES KANGAS, PETER JAY KANGAS, TERI
KIMINSKI, CHAD KIMINSKI, AMANDA KIMINSKI,
KATHY KRAM, KENNY KRAM, BRIAN KRAM,
CHRISTOPHER KRAM, BERNADETTE MARKO,
ROBERT MARKO, JEFREY MCCANN, CATHERINE
MCCANN, LORI O'NEIL, SHANE O'NEIL, SHAD
O'NEIL, SHEYANNE O'NEIL, SHALEAK O'NEIL,
SHAY SAMUELSON O'NEIL, CONNIE L. SATRE,
MARK W. SATRE, MARA K. SATRE, SONJA
SAVAGE, WILLIAM SAVAGE, JACOB SAVAGE,
JESSE SAVAGE, RICHARD WALIOR, JAMES
BENESCH, MARY BENESCH, MELISSA BENESCH,
CORRINA BENESCH, LAURI BENESCH, DAVID W.
BRUNCLIK, LORETTA P. BRUNCLIK, SCOTT W.
BRUNCLIK, CHRISTOPHER BRUNCLIK, MICHAEL
D. BURRELL, LINDA L. BURRELL, RITA A.
BURRELL, AMY L. BURRELL, DAVID P. BURRELL,
VERNON A. BUSHEY, CONNIE L. BUSHEY,
RHONDA M. BUSHEY, MICHELE L. BUSHEY, CARL
B. CADOTTE, KYLE L. CADOTTE, ROGER
CARBON, TERRY CARBON, BART CARBON, CORY

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CARBON, HENRY G. COOK, DANIEL DESMIDT, KIM DESMIDT, BRENDA DESMIDT, CHAD DESMIDT, STANLEY DERAITUS, BARBARA DERAITUS, MICHELLE DERAITUS, DANIEL DERAITUS, SCOTT DERAITUS, MARK DERAITUS, MICHAEL D. DWYER, BETTY A. DWYER, LAWRENCE FAUST, KIM FAUST, SAMANTHA FAUST, AARON FAUST, ANTHONY FURYK, SANDRA FURYK, BRUCE FURYK, LYNN FURYK, AMY FURYK, MARK GANSKE, MICHELE GANSKE, AMANDA GANSKE, BERTHA M. HANNU, WILLIAM V. HANNU, DIANE C. HIETALA, WILLIAM S. HIETALA, WAYNE W. HIETALA, SANDRA B. HOEFFLING, DARRELL F. HOEFFLING, JAMES W. HOEFFLING, MICHELLE L. HOEFFLING, AARON C. HOEFFLING, LINDA M. JONES, BRUCE A. JONES, KURT A. JONES, SCOTT M. JONES, CHAD J. JONES, ELIZABETH M. KELLETT, THOMAS W. KELLETT, JACQULYN LAMBERTY, ROBERT LAMBERTY, LISA LAMBERTY, LINDY LAMBERTY, ROBERTA LAMBERTY, BARRY LARSEN, CAROLYN LARSEN, DAWN LARSEN, BRYANT LARSEN,, GARRETT LARSEN, DESSI LARSEN, PATTY J. LARSON, OWEN J. LARSON, BETH A. LARSON, JAMES LARSON, NANCY E. LAUREN, DENNIS F. LAUREN, SHAWNA L. LAUREN, SCOTT D. LAUREN, WENDY N. LAUREN, BRIAN LONG, SHEILA LONG, JASON LONG, CLAYTON LONG, MARY ANN LUDWIKOWSKI, FRANK J. LUDWIKOWSKI, ROSE MALEK, GRETCHEN VISSERS, ELAINE VISSERS, STEPHANIE VISSERS, ARLENE KAY MILLER, DONALD V. MILLER, JEFFREY B. O'DONNELL, CHERYL A. O'DONNELL, SHANNON L. O'DONNELL, DANA R. O'DONNELL, NATHAN J.

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O'DONNELL, ROBERT A. PARES, KATHLEEN E. PARES, KRISTY M. PARES, KERRY A. PARES, DOUGLAS PETERSON, MARGARET PETERSON, BRUCE PETERSON, SCOTT PETERSON, RUSSEL PETERSON, DANIEL PETERSON, TERRY PETERSON, MONICA RICE, THOMAS RICE, JASON RICE, IVY RICE, AMY RICE, LOIS K. RILEY, DONALD R. RILEY, TIMOTHY M. SALTER, JOHN SCHNEIDER, ALVINA H. SLEIGHT, MARTIN DAVID SLEIGHT, TERESA L. SMITH, LOUIS W. SMITH, MICHELLE SMITH, STEPHANIE SMITH, DEBORAH A. SWARTZ, MICHAEL S. SWARTZ, MARCUS S. SWARTZ, MICHAEL D. SWARTZ, GENE VISGER, LOLA VISGER, MICHELLE VISGER, ERIC VISGER, DENNIS WARTGOW, CATHLEEN WARTGOW, AMANDA WARTGOW, WILLIAM WARTGOW, ANDREA WARTGOW, DANE E. ZOOK, CONNIE R. ZOOK, LLOYD J. ZOOK, JEREMY D. ZOOK, RUSSEL J. ZOOK, AARON G. ZOOK,

Plaintiffs-Appellants-Petitioners,

v.

UNITED STATES OF AMERICA, CLAYTON K. YEUTTER, NEAL SOX JOHNSON, and JACK F. KEMP,

Defendants-Appellees-Respondents.

ORDER

89-C-576-C

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This is a civil action for monetary relief brought pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 et seq. Plaintiffs purchased certain factory-built homes that were built with allegedly inadequate vapor barriers that trapped moisture in the wall cavities of the houses, causing the sheathing to rot. Plaintiffs purchased the houses with the financial assistance of either the Department of Housing and Urban Development (HUD) or the Farmers Home Administration (FmHA). Preliminary approval of the manufacturer's design for the construction of the homes was a precondition for the government-assisted financing. Plaintiffs contend that HUD was negligent in its approval of the design and that defendant's negligence is causally related to the physical damage to plaintiffs' homes, and to the personal injuries and mental suffering that they have incurred.

Presently before the court is defendants' motion for summary judgment. Defendants argue that the court lacks subject matter jurisdiction because plaintiffs' claims are for misrepresentation, a cause of action barred expressly by the Federal Tort Claims Act. 28 U.S.C. § 2680(h). Because I find that plaintiffs do not raise a claim independent of the tort of misrepresentation, defendants' motion will be granted.

From the parties' proposed findings of fact and accompanying affidavits, and solely for the purposes of deciding this motion for summary judgment, I find that no genuine dispute exists with respect to the following material facts.

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FACTS

Plaintiffs are occupants of factory-built houses constructed by Tri State Homes, Inc. in Mercer, Wisconsin during the years 1970 to 1978. Most of the plaintiffs obtained financial assistance to purchase their houses from FmHA pursuant to §502 of the Federal Housing Act, 42 U.S.C. §1472.¹ The others financed the purchase of their homes with the aid of mortgage insurance issued by HUD.

All of the houses involved in this case were models covered by HUD's Regional Letter of Acceptance number 71-93, which was issued by an HUD regional office to Tri State on January 26, 1971 and updated in 1975 and 1977. This Letter of Acceptance indicated that the Tri State models listed were acceptable or approved for federal financing and that the materials listed in the manufacturer's plans and specifications met HUD's Minimum Property Standards. Without this Letter of Acceptance or an equivalent review of Tri State's plans by FmHA, buyers could not use federal financing to purchase houses from Tri State.

¹The primary purpose behind the Housing Act of 1949 is "the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family..." 42 U.S.C. §1441 (1970). Title V of the Act states that such a goal is to be pursued for farm families and those living in rural areas. The Secretary of Agriculture is authorized by §502 to extend financial and technical assistance through FmHA to eligible rural residents to enable them to obtain "decent, safe, and sanitary" housing. 42 U.S.C. §1471(a).

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In order to secure the Regional Letter of Acceptance for its models, Tri State submitted to HUD copies of the building plans, dwelling specifications, and description of materials (form FHA 2005) for each model. Personnel at an HUD regional office reviewed these documents to determine whether the models were acceptable for participation in the HUD mortgage insurance program.²

Compliance with HUD's Minimum Property Standards was required before a Letter of Acceptance would issue. If the plans and specifications did not satisfy the Minimum Property Standards, Tri State would have had to amend its plans so that they complied with these requirements. Also, once the houses were built, Tri State had to certify to HUD that each house was built in compliance with the Regional Letter of Acceptance and with the Minimum Property Standards.

After issuance of the Regional Letter of Acceptance in January 1971, HUD inspected Tri State's factory approximately two times per year. Each inspection lasted about two to three hours. The purpose of these visits was to ensure that the materials used in the construction of the homes conformed with the materials listed in the specifications. In other words, the inspectors did not test the materials for compliance with the Minimum Property Standards, but rather made sure that the materials being used were the same as those approved

²Although the parties dispute the location of this regional office, for purposes of this motion only defendants accept plaintiffs' proposed finding that the office was in Milwaukee, Wisconsin.

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in the Letter of Acceptance. The inspectors relied on the earlier determination by the HUD regional office that the materials listed satisfied the Minimum Property Standards.

Most applicants who sought FmHA financing for the purchase of new Tri State homes submitted copies of dwelling specifications with their applications to the appropriate FmHA county office. These specifications were prepared in part by Tri State and in part by the dealer from whom the buyer intended to purchase the factory-built house. Although the FmHA county supervisor would review the specifications submitted with the application for financing, he did not review the section of the specifications for the factory-built portion of the house to determine whether they met the Minimum Property Standards. Rather, the supervisor relied on the HUD Regional Letter of Acceptance and Tri State's certification that the house was built with materials that met the minimum standards. In fact, all government inspectors of the houses, whether in the factory or on-site, relied on the Regional Letter of Acceptance and the builder's certification that the materials used complied with the Minimum Property Standards.

The plans and specifications submitted by Tri State to HUD indicated that the manufacturer intended to use Thilco 30/30 building paper as sheathing paper on its houses. Sheathing paper is placed between the outside of a wall and the house's siding to prevent condensation problems in the wall cavity. The HUD Minimum Property Standards in effect during 1970 to 1978 required that sheathing paper have a perm (permeability) rating of at least five perms. However, the sheathing paper used on plaintiffs' homes had a perm rating of less than one perm.

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As a consequence of its low permeability, the Thilco 30/30 paper trapped moisture in the wall cavity and caused the sheathing to rot. By living in houses with rotting walls, plaintiffs have suffered physical injuries.

OPINION

The Federal Tort Claims Act (FTCA) is a waiver of sovereign immunity that permits an injured claimant to recover damages from the United States in situations in which a private person "would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §1346(b). However, the FTCA excepts the government from liability for certain torts, one of which is misrepresentation. 28 U.S.C. §2680(h). In the present case, the issue raised by defendants' motion is whether the government's approval of Tri State's use of substandard sheathing paper constitutes a cause of action independent of a claim for misrepresentation.

Plaintiffs contend that their claim is not barred because they were not harmed by relying on the government's misstatements, but rather by the government's failure to detect the proposed use of an inadequate building material in Tri State's submitted plans. Defendants argue that plaintiffs' claims fall within the exception because they arise out of the government's communication of faulty information through its approval of Tri State's houses in its Regional Letter of Acceptance.

This issue requires an examination of the scope of the FTCA's misrepresentation exception. The Supreme Court has addressed the contours of this exception on two

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occasions, in *United States v. Neustadt*, 366 U.S. 696 (1961) and again in *Block v. Neal*, 460 U.S. 289 (1983).

In *Neustadt*, plaintiffs purchased a home with a private mortgage loan insured by the Federal Housing Authority (FHA) pursuant to §203 of the National Housing Act of 1934, 12 U.S.C. §1709. In determining whether the property in question was eligible for federal financing, the FHA inspected the home and issued an appraisal report that established the maximum amount of mortgage insurance attainable for the house. FHA found no defects in the residence. Plaintiffs relied on this appraisal report when negotiating the price for the house.

Shortly after plaintiffs took possession, the foundation of the house began to shift causing damage to the walls and ceilings. Plaintiffs sued the government under the FTCA to recover the difference between the fair market value of the house and the inflated purchasing price. Plaintiffs claimed that the FHA was negligent in its inspection and appraisal of the residence and that they justifiably relied on the appraisal in paying a higher price than they otherwise would have paid.

The Court held that plaintiffs' claim was barred by the misrepresentation exception of the FTCA, stating that any tort committed by the FHA because of an inaccurate report resulting from a negligent inspection would be one arising out of misrepresentation.

[T]he duty to use due care in obtaining and communicating information upon which [plaintiff] may reasonably be expected to rely in the conduct of his economic affairs,

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is only to state the traditional and commonly understood legal definition of the tort of "negligent misrepresentation"....

Neustadt, 366 U.S. at 706.

In *Block v. Neal*, the Court reaffirmed its holding in *Neustadt* that "the essence of an action for misrepresentation, whether negligent or intentional, is the communication of misinformation on which the recipient relies." *Block*, 460 U.S. at 296. However, the Court limited the scope of the misrepresentation exception to those situations in which a plaintiff alleges no injury that he would have suffered independently of his reliance on the misinformation. *Id.*

In *Block*, the plaintiff entered into a contract to have a house built for her. The agreement provided that FmHA would provide the financing for plaintiff, that the work of the builder would conform to plans of the FmHA, and that FmHA had the right to inspect and to test all materials and workmanship and to reject any that were defective.

An FmHA official inspected the house twice during its construction and once upon its completion. After the third inspection, the official issued a final report indicating that the house accorded with the drawings and specifications approved by FmHA. Plaintiff signed this report. However, upon moving into the house, plaintiff discovered numerous defects, which the builder refused to cure despite the warranty it had given. Plaintiff then requested payment from FmHA, which refused to pay as well.

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The Court of Appeals for the Sixth Circuit held that plaintiff's claim was not barred by the misrepresentation exception of the FTCA because §323 of the Restatement (Second) of Torts created an independent duty of care for those who undertake to render a service to others (the Good Samaritan doctrine). "One who undertakes to act, even though gratuitously, is required to act carefully and with the exercise of due care and will be liable for injuries proximately caused by failure to use such care." *Neal v. Bergland*, 646 F.2d 1178, 1182 (6th Cir. 1981).

On review, the Supreme Court found that plaintiff's Good Samaritan claim was not barred by the misrepresentation exception. Although the two causes of action shared common elements, each focused on distinct aspects of the government's conduct.

Section 2680(h) thus relieves the Government of tort liability for pecuniary injuries which are wholly attributable to reliance on the Government's negligent misstatements....But it does not bar negligence actions which focus not on the Government's failure to use due care in communicating information, but rather on the Government's breach of a different duty.

In this case, unlike *Neustadt*, the Government's misstatements are not essential to plaintiff's negligence claim...FmHA's duty to use due care to ensure that the builder adhere to previously

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approved plans and cure all defects before completing construction is distinct from any duty to use due care in communicating information to respondent.

Id. at 297.

In the present case, unlike *Block*, the government's misstatements are essential to plaintiffs' claims. In order for Tri State to have become able to sell houses that were eligible for government financing, HUD had to issue a Regional Letter of Acceptance listing those Tri State homes that had been approved. Plaintiffs relied on this Letter of Acceptance as an assurance that the Tri State homes were constructed in accordance with government standards. As in *Neustadt*, plaintiffs relied on misinformation in a government document when making their decision to purchase a home. The fact that the misrepresentation in question is based on underlying negligent conduct is inapposite: the government's negligence would not have harmed plaintiffs had the misinformation not been communicated through the Regional Letter of Acceptance.

In this regard, the case of *Baroni v. United States*, 662 F.2d 287 (5th Cir. 1981) is instructive. In *Baroni*, a subdivision developer submitted his plans to the FHA for approval, seeking to qualify the project's housing units for federal financing. One condition of the agency's approval was that certain lots had to be filled to an elevation above the predicted fifty-year flood height. The FHA set the requisite level that the developer had to meet.

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The flood level location fixed by the FHA was incorrect. On two occasions the subdivision was flooded and plaintiffs' houses were damaged. Plaintiffs brought action under the FTCA and the Court of Appeals for the Fifth Circuit held that the claims were barred by the misrepresentation exception of §2680(h). Notably, the court indicated that even if state law created a duty to set the flood level non-negligently, the plaintiffs' damages still arose from the government's misrepresentation.

Assuming that the government's undertaking created a duty under state law to determine the flood level non-negligently, the damages complained of by the plaintiffs still result solely from the fact that the government communicated its miscalculation to the developer who relied on it, and that reliance eventually caused the plaintiffs' damage.

Id. at 289.

The Court of Appeals for the Seventh Circuit employed similar reasoning in *Preston v. United States*, 596 F.2d 232 (7th Cir. 1979). In that case, farmers brought action under the FTCA against the government for amounts which they lost as a result of storing grain in a government approved warehouse that went bankrupt. The Commodity Credit Corporation of the Department of Agriculture had entered into an agreement with the warehouse in question that provided that farmers with grain on deposit at the warehouse could obtain loans from the Commodity Credit Corporation by using the deposited grain as security. The Commodity Credit Corporation had approved the warehouse as a safe place for the storage of

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grain. Because of the government's approval of the warehouse, plaintiffs stored an increasing amount of their grain with the facility. Despite the government's assurances, the warehouse was near bankruptcy and ultimately failed.

The court of appeals held that plaintiffs' claims were actions for implied misrepresentation and were thus barred by §2680(h).

On analysis, we think it clear that what plaintiffs are complaining about is an implied misrepresentation. They have alleged that the approval and subsequent auditing of the warehouse by government agencies created an aura that the warehouse was safe, and that they relied to their detriment on this apparent approval by the government agencies...[T]his amounts to an allegation of misrepresentation by implication.

Id. at 238.

Similarly, in the present case, plaintiffs complain that the government's approval of Tri State's plans created the assurance that the homes were constructed with proper materials. As the Court of Appeals for the Fifth Circuit recognized in *Baroni*, such claims are grounded in misrepresentation, because they are based on the conveyance of inaccurate information. Put another way, as the Supreme Court stated in *Block*, plaintiffs would not have been injured had the government not first communicated its misinformation. Because the

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government did covey such misstatements and because plaintiffs relied on them, the plaintiffs suffered harm.

Moreover, unlike the situation in *Block*, defendants' inspection of the construction of the homes was not itself negligent. Rather, the inspections relied on the accuracy of the Regional Letter of Acceptance, which contained a misstatement. Therefore, any breach of duty on behalf of the government occurred in communicating its approval, not in any subsequent investigations of the construction.

Plaintiffs contend that even if elements of their actions do make up a claim for misrepresentation, this does not bar them from bringing a suit under the FTCA pursuant to Wisconsin's Good Samaritan doctrine. I do not find this to be the case. It is true that in *Block* the Supreme Court stated that just because one aspect of the government's conduct may not be actionable under the misrepresentation exception, a claimant is not barred from pursuing a distinct claim based on other aspects of the government's conduct. *Block*, 460 U.S. at 298. However, the Court said also that §2680(h) relieves the government of "tort liability for pecuniary injuries which are wholly attributable to reliance on the Government's negligent misstatements." *Id.* at 297. The Court reconciled these positions by noting that the plaintiff would have been injured independently of the government's erroneous report, because the house would have been built whether or not the report was issued. In other words, a second potential claim arose because the government exercised a discretionary right to inspect the construction, and this decision to inspect only tangentially involved a communication of information.

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In the present case, on the other hand, the government's communication of its approval was a condition precedent to the construction of Tri State's houses according to its submitted specifications. Unlike *Block*, but similar to *Neustadt*, plaintiffs' claims would not have arisen if the government had not issued its erroneous report. Accordingly, consideration of potential claims under Wisconsin's Good Samaritan doctrine are barred by §2680(h)'s misrepresentation exception.

It is unfortunate that plaintiffs have no remedy against the United States for the wrongs they have suffered, but the law permits no other resolution. It is Congress that determines the scope of the government's tort immunity, not the courts.

Order

IT IS ORDERED that defendants' motion for summary judgment is GRANTED.

Entered this 27th day of March, 1990.

BY THE COURT:

s/

BARBARA B. CRABB
District Judge